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# Investment treaties, sustainable development and reasonableness review: A case against strict proportionality balancing

Dr Federico Ortino<sup>1</sup>

**Abstract:** The paper tackles the question of how far should investment tribunals go in reviewing the reasonableness of host State conduct. Based on an evolutionary interpretation of the preamble of international investment treaties and focusing on the principle of integration as the key element of the concept of sustainable development, the paper main argument is that investment tribunals should avoid a review based on proportionality *stricto sensu* or cost-benefit balancing.

**Key words:** Investment treaties; sustainable development; reasonableness; proportionality; balancing

## 1. Introduction

Investment treaty law is a goldmine for academics with a compulsion for ordering chaos. Diverging opinions with regard to, for example, the very notion of investment for purposes of determining the scope of investment treaties and the jurisdiction of investment tribunals, the content of the various substantive protections guaranteed by investment treaties (such as the fair and equitable treatment standard or the notion of indirect expropriation), and the role of investment (arbitral) tribunals are simply a fact of life in investment treaty law. Following such compulsion, the paper tackles one controversial question: what is the nature of an investment tribunal's review based on the reasonableness of the host State's conduct under an investment treaty? This is a particularly crucial question as investment tribunals are presently engaged in reviewing a very wide range of public acts including the acts of any State organ exercising legislative, executive, judicial or any

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other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.<sup>2</sup>

Several international investment treaties expressly prohibit host States to adopt ‘unreasonable or discriminatory measures’ that impair the management, maintenance, use, enjoyment or disposal of foreign investments<sup>3</sup> and/or require host State to accord ‘equitable and reasonable treatment and protection’ to foreign investment.<sup>4</sup> Furthermore, several provisions contained in international investment treaties have been interpreted to impose substantive reasonableness requirements on host States.<sup>5</sup> For example, the tribunal in *Saluka v Czech Republic* interpreted the ‘fair and equitable treatment’ (FET) standard in the Netherlands-Czech Republic BIT to include the prohibition to act in a way that is “unreasonable (i.e. unrelated to some rational policy), or discriminatory (i.e. based on unjustifiable distinctions).”<sup>6</sup> In *AAPL v Sri Lanka*, the tribunal interpreted the ‘full protection and security’ standard in the United Kingdom-Sri Lanka BIT as imposing a due diligence obligation, which “requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.”<sup>7</sup> The tribunal in *Glamis Gold v USA* interpreted the customary international law minimum standard of treatment, as codified in Article 1105 NAFTA, to include the prohibition of conduct involving “a complete lack of reasons.”<sup>8</sup> Even in the context of determining the existence of an indirect expropriation, it has been argued that there is no right to compensation for the legitimate and *bona fide* exercise of sovereign police powers subject *inter alia* to an analysis of reasonableness.<sup>9</sup>

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<sup>2</sup> See Article 4 of the International Law Commission (ILC) Articles on Responsibility of States for Internationally Wrongful Acts.

<sup>3</sup> 1991 Netherlands-Czech Republic BIT, Article 3(1); Energy Charter Treaty, Article 10(1). See Newcombe & Paradell *Law and Practice of Investment Treaties* (Kluwer, 2009) at 298.

<sup>4</sup> Norway-Lithuania BIT, Article III.

<sup>5</sup> See Vandevelde *Bilateral Investment Treaties: History, Policy, and Interpretation* (OUP, 2010) Chapter 5 on ‘Reasonableness’. Investment treaty provisions have also been interpreted to include certain procedural reasonableness requirements such as transparency, procedural propriety and due process. See Dolzer & Schreuer *Principles of International Investment Law* at 145.

<sup>6</sup> *Saluka v Czech Republic*, Award, 17 March 2006, para. 309

<sup>7</sup> *AAPL v Sri Lanka*, Award, 27 June 1990, para. 85(B).

<sup>8</sup> *Glamis Gold v USA*, Award, 8 June 2009, para. 627.

<sup>9</sup> Newcombe & Paradell *Law and Practice of Investment Treaties* at 358.

While in general terms, reasonableness entails “a sufficient causal link between the legitimate objective sought and the behaviour that one seeks to establish as reasonable”,<sup>10</sup> a standard based on the reasonableness of public conduct may more specifically entail a variety of tests involving different levels of intrusiveness in the regulatory prerogatives of States. At the lower end of the intrusiveness spectrum, reasonableness may require that the conduct under review be, at least potentially, capable of positively contributing to the public policy objective at issue. In this context the relevant question is whether the conduct adopted is likely to achieve at least in part the legitimate policy aim.<sup>11</sup> A standard based on reasonableness may also require that the conduct chosen by the public authority entailed the lowest possible burden to achieve the specific policy goal. In this context, the underlying question is whether the conduct adopted is the most cost-effective in achieving the legitimate policy aim. At the other end of the spectrum, reasonableness may require a balancing of the conduct’s costs and benefits with regard to the various interests at stake. Here the key question is whether the impact of the conduct on the investor is proportional to the legitimate policy aim.

As the transnational public lawyer is well aware, these three distinct ‘reasonableness’ tests are neatly captured by the three prongs – ‘suitability’, ‘necessity’ and ‘strict proportionality’ – of the principle of proportionality, which finds its modern origin in German public law and its application in various domestic, regional and international legal systems.<sup>12</sup>

It is on the latter, most intrusive test based on strict balancing or proportionality *stricto sensu* that this paper wishes to focus. While many investment tribunals have referred to ‘reasonableness’ without clearly defining the nature of their review,<sup>13</sup> in a growing number of cases, investment

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<sup>10</sup> Olivier Corten “The notion of ‘reasonable’ in international law: legal discourse, reason and contradictions” 48 *ICLQ* (1999) at 623.

<sup>11</sup> There may even be a less intrusive test that more simply requires that the conduct under review be aimed at a legitimate public policy, or in other words, that the conduct adopted be a good faith attempt at addressing a specific legitimate policy concern. In international investment law, this is often linked with the prohibition of arbitrariness (in customary international law) and with so called self-judging clauses.

<sup>12</sup> Among the vast scholarship on the topic see Jurgen Schwarze *European Administrative Law* (Luxemburg, Sweet & Maxwell, 1992); Mads Andenas & Stefan Zleptnig “Proportionality: WTO Law in Comparative Perspective” in 42 *Texas International Law Journal* (2007) 371; Aaron Barak “Proportionality and Principled Balancing” in 3 *Law & Ethics of Human Rights* (2010) 1.

<sup>13</sup> See for example, in *Pope & Talbot v Canada*, the tribunal examined the host State conduct under Article 1105 NAFTA and found that “the approach taken by Canada was a reasonable response to the difficulty with which it had to deal and cannot be characterized as unfair or inequitable.” *Pope & Talbot v Canada*, Award on the Merits of

tribunals appear to have engaged in balancing between the interests of the foreign investor, on the one hand, and the broader public policy interests of the host State. For example, in the context of determining the existence of an indirect expropriation, the tribunal in *Tecmed v Mexico* stated that “[t]here must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure.”<sup>14</sup> In a similar context, the tribunal in *Suez v. Argentina* noted that “States have a legitimate right to exercise their police powers to protect the public interest and that the doctrine of police powers [...] has been particularly pertinent in cases of expropriation where tribunals have had to balance an investor’s property rights with the legitimate and reasonable need for the State to regulate.”<sup>15</sup> In the context of applying the fair and equitable treatment (FET) standard, the tribunal in *Saluka v Czech Republic* noted that such standard “requires a weighing of the Claimant’s legitimate and reasonable expectations on the one hand and the Respondent’s legitimate regulatory interests on the other.”<sup>16</sup> Similarly, the tribunal in *Electrabel v Hungary* stated that reasonableness includes “the requirement that the impact of the measure on the investor be proportional to the policy objective sought.”<sup>17</sup>

The uncertainty stemming from the growing arbitral practice with regard to the nature and contours of investment tribunals’ review based on reasonableness-type standards is accompanied by an equally growing number of voices calling for investment tribunals to adopt a ‘balanced approach’

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Phase 2, 10 April 2001, paras. 123, 125 and 128. Similarly, in *Chemtura v Canada*, the tribunal rejected the claim of indirect expropriation under Article 1110 NAFTA in part because “the measures challenged by the claimant constituted a valid exercise of the Respondent’s police powers [and specifically since the domestic regulatory authority] took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment.” *Chemtura v Canada*, Award, 2 Aug 2010, para. 266.

<sup>14</sup> *Tecmed v Mexico*, Award, 29 May 2003, para. 122. See B Kingsbury and S Schill “Public Law Concepts to Balance Investors’ Rights with State Regulatory Actions in the Public Interest—The Concept of Proportionality” in S Schill (ed.) *International Investment Law and Comparative Public Law* (Oxford, OUP 2010) at 89-98; Alessandra Asteriti, “Regulatory expropriation claims in international investment arbitrations” in Andrea Byorklund (ed.) *Yearbook of International Investment Law and Policy 2012-2013* (OUP, 2014).

<sup>15</sup> *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal S.A. v Argentina*, Decision on Liability, 30 July 2010, para. 147. See further Jonathan Bonnitcha *Substantive Protection under Investment Treaties: A Legal and Economic Analysis* (Cambridge, CUP 2014) at 260 et seq identifying two interpretative approaches within the ‘balancing structure’ employed by arbitral tribunals in order to determine the existence of an indirect expropriation.

<sup>16</sup> *Saluka v Czech Republic*, Award, 17 March 2006, para. 306.

<sup>17</sup> *Electrabel v Hungary*, Award, 25 November 2015, para. 179. See also *Micula et al v Romania*, Award, 11 December 2013, “for a state’s conduct to be reasonable, it is not sufficient that it be related to a rational policy; it is also necessary that, in the implementation of that policy, the state’s acts have been appropriately tailored to the pursuit of that rational policy with due regard for the consequences imposed on investors.” At para. 525.

in the interpretation of investment treaty standards (such as FET) taking both the interests of investor protection and other interests of social development and environmental protection into account.<sup>18</sup> More specifically, several commentators have pointed to the principle of proportionality as an instrument to (re)balance the need to afford protection to foreign investors, on the one hand, and the need to guarantee host State's right to regulate in the public interest, on the other.<sup>19</sup>

The paper's main argument is that, when reviewing host State conduct on the basis of reasonableness-type standards, investment tribunals should avoid a review based on strict balancing or proportionality in the strict sense (also known as 'cost-benefit balancing'). This argument is *per se* not novel and has been justified on various grounds. For example, Ranjan has argued that cost-benefit balancing should be excluded because investment treaty arbitration lacks certain institutional safeguards and constitutional features like "independence of the judiciary, appellate review, separation of powers, and a written constitution that gives judges the right to decide which compelling interest should prevail".<sup>20</sup> Pirker has justified a similar argument based on the fact that "the rationale of subsidiarity of virtual representation set out for example in the ECHR [evidenced in the requirement of exhaustion of local remedies, the development of common standards of protection and a project of political integration] does not find its match in international investment protection."<sup>21</sup>

The present paper's argument against strict proportionality balancing is instead premised on the complex nature of investment treaties' 'object and purpose', as the crucial element in imparting

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<sup>18</sup> See Roland Kläger "Fair and Equitable Treatment' and Sustainable Development" in Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (Kluwer, 2011) at 259.

<sup>19</sup> See A Stone Sweet "Investor-State Arbitration: Proportionality's New Frontier" 4 *Law and Ethics of Human Rights* 47 (2010); B Kingsbury & S Schill "Public Law Concepts to Balance Investors' Rights with State Regulatory Actions in the Public Interest – The Concept of Proportionality" in S Schill (ed) *International Investment Law and Comparative Public Law* (2010) 75; U Kriebaum "Regulatory Takings: Balancing the Interests of the Investor and the State" 8 *Journal of World Investment and Trade* 717 (2007).

<sup>20</sup> P Ranjan "Using the Public Law Concept of Proportionality to Balance Investment Protection with Regulation in International Investment Law: A Critical Appraisal" 3 *Cambridge Journal of International and Comparative Law* 853 (2014) at 862. See further, Caroline Henckels *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge, CUP 2016) at 164-68.

<sup>21</sup> B Pirker "Seeing the Forest without the Trees – The Doubtful Case for Proportionality Analysis in International Investment Arbitration" SSRN (2011) at 8.

meaning to the open-textured treaty standards.<sup>22</sup> The argument is developed in the following three stages. The analysis begins with identifying the ‘object and purpose’ of investment treaties. My conclusion here is that, while *investment protection* has always been the principal (and often exclusive) focus of investment treaties, the underlying purpose of such treaties has evolved from economic prosperity to *sustainable development* (section 2).<sup>23</sup>

Secondly, the analysis addresses the evolving and multi-faceted concept of sustainable development. The focus here is on sustainable development as a *policy objective* rather than as legal principle. Sharing the views of those that believe that the *principle of integration* represents the key component of sustainable development, in this section I highlight that, at a primordial level, the concept of sustainable development leaves a wide margin of freedom to the decision-maker in the determination of the appropriate balance between its three key components: economic growth, environmental protection and social development (section 3).

The third and final stage of the analysis focuses on demonstrating how the specific ‘object and purpose’ identified in the previous two sections justifies the argument against strict balancing or proportionality in the strict sense. As sustainable development revolves around the integration of different values without specifying the ultimate outcome of that balancing process, sustainable development, as the relevant purpose of investment treaties, demands an interpretation of reasonableness-based standards that leaves the balancing of the various interests or values at issue to the public decision-maker (ie., the host State) (section 4).

## **2. The ‘object and purpose’ of investment treaties: from investment protection for economic prosperity to investment protection for sustainable development**

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<sup>22</sup> See the customary general rule of treaty interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties (VCLT).

<sup>23</sup> I borrow in this context the distinction between ‘object’ and ‘purpose’ put forward by Buffard & Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?” 3 *Austrian Review of International and European Law* 311 (1998) at 326 (“The object of a treaty is the instrument for the achievement of the treaty’s purpose.”). See further Federico Ortino, “Investment Treaty System as Judicial Review”, 24 (3) *American Review of International Arbitration* 437 (2013).

Everyone recognizes the importance of identifying the ‘object and purpose’ of an investment treaty. This is indeed expressly required as part of applying the customary general rule of treaty interpretation codified in Article 31 of the Vienna Convention on the Law of Treaties (VCLT). More fundamentally, the open-textured nature of the various standards provided in an investment treaty makes the identification of the ‘object and purpose’ a crucial element in imparting meaning to those standards.<sup>24</sup> For purposes of determining the ‘object and purpose’ of a treaty, there are potentially several sources of guidance including the title, preamble, and entire text of the treaty.<sup>25</sup>

Different views have emerged with regard to the question of what is the ‘object and purpose’ of an investment treaty. Focusing on the title of the 1991 Argentina-United States BIT, the *Azurix* tribunal stated simply that the purpose of the treaty is “to encourage and protect investment”.<sup>26</sup> On the other hand, the *LG&E* tribunal focused on the apparently broader language found in the preamble of the same US-Argentina BIT and noted that “in entering the BIT as a whole, the parties desired to ‘promote greater economic cooperation’ and ‘stimulate the flow of private capital and the economic development of the parties’”.<sup>27</sup>

For purposes of this discussion, I find it useful to distinguish between the ‘object’ and ‘purpose’ of an investment treaty, as suggested by Buffard and Zemanek. Accordingly, while the ‘object’ of a treaty is the substantial content of the treaty, that is the provisions, rights and obligations created by the treaty, the ‘purpose’ is the reason for establishing the substantial content of the treaty.<sup>28</sup> The relevance of distinguishing between ‘object’ and ‘purpose’ is to provide a guarantee against an excessively teleological interpretation, whatever the telos may be.<sup>29</sup>

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<sup>24</sup> For example, tribunals have relied on the object and purpose of the investment treaty in interpreting the ‘fair and equitable treatment’ clause and the so called ‘umbrella’ clause as well as the notion of ‘investment’ for purposes of determining the subject matter jurisdiction of ICSID tribunals.

<sup>25</sup> Richard Gardiner *Treaty Interpretation* (Oxford, OUP, 2008) at 192.

<sup>26</sup> *Azurix v Argentina*, Award, 2006 at para. 372.

<sup>27</sup> *LG&E v Argentina*, Award, 2006, at para. 124

<sup>28</sup> Buffard & Zemanek, “The ‘Object and Purpose’ of a Treaty: An Enigma?” 3 *Austrian Review of International and European Law* 311 (1998) at 326.

<sup>29</sup> “If ‘purpose’ were the only guiding principle for interpretation, unfettered teleology would be possible and the treaty provisions actually agreed upon might become more or less irrelevant as long as the conduct of the parties achieved the aim of the treaty. By joining ‘object’ to the guiding principle, the provisions of the treaty are linked to its aim and the conduct of the parties for achieving the aim is confined to the rights and obligations established by the treaty provisions. Interpreting a treaty in the light of its object and purpose is thus a more restricted variant of teleological interpretation.” Buffard & Zemanek, at 332.



Following this methodology, it may be argued that the ‘object’ of international investment treaties is the protection of foreign investment and the ‘purpose’ of investment treaties is to intensify economic cooperation, encourage international capital flows and increase the prosperity of both contracting parties.<sup>30</sup> In other words, the investment protection guarantees provided for in the body of the treaty are the instruments with which to encourage capital flows between the two countries and in turn contribute to the prosperity and development of both contracting parties.<sup>31</sup>

Two consequences flow from this argument. First, whether or not one follows the distinction between ‘object’ and ‘purpose, the point is that “most treaties have no single, undiluted object and purpose but rather a variety of different, and possibly conflicting, objects and purposes.”<sup>32</sup> Accordingly, the object and purpose of an investment treaty cannot merely be the protection of foreign investments, as some tribunals have assumed,<sup>33</sup> but entails a variety of aims, interests and values. Secondly, and more fundamentally today, given the importance of the preamble in determining the ‘long-term purpose’ of a treaty,<sup>34</sup> the ‘prosperity’ or ‘development’ of both contracting parties become relevant terms in the identification of the treaty’s long-term purpose and thus in imparting meaning to the various open-textured provisions of investment treaties.

Accordingly, the aim of this section is to investigate in more details the long-term purpose of investment treaties and particularly the meaning of the terms ‘prosperity’ and ‘development’.

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<sup>30</sup> The preamble to the 1959 Germany-Pakistan BIT reads as follows: DESIRING to intensify economic co-operation between the two States, INTENDING to create favourable conditions for investments by nationals and companies of either State in the territory of the other State, and RECOGNIZING that an understanding reached between the two States is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States, HAVE AGREED AS FOLLOWS”. The preamble to the 2009 Germany-Pakistan BIT reads as follows: “Desiring to intensify economic co-operation between both States, Intending to create favourable conditions for investments by investors of either State in the territory of the other State, Recognizing that the encouragement and protection of such investments can stimulate private business initiative and increase the prosperity of both Contracting States, Have agreed as follows”.

<sup>31</sup> See Gus Van Harten *Investment Treaty Arbitration and Public Law* (Oxford, OUP 2007) at 140.

<sup>32</sup> *United States Import Prohibition of Certain Shrimp and Shrimp Products*, Appellate Body Report, WT/DS58/AB/R (1998) at para. 17.

<sup>33</sup> See for example, *Tokios Tokeles*, Decision on Jurisdiction, 29 April 2004, at para. 85 (“the object and purpose of the BIT is to provide broad protection for investors and their investments.”) and *Sempra Energy International v Argentina*, ICSID Case No. ARB/02/16, Decision on Jurisdiction, 11 May 2005, at para. 142 (“...the clear intention was to provide full protection for investors.”). For a more ‘enlightened’ view see *Lemire v Ukraine*, Decision on Jurisdiction and Liability, 14 January 2010 at paras. 272-73.

<sup>34</sup> Richard Gardiner *Treaty Interpretation* (Oxford, OUP, 2008) at 196-199.

which one can find in the preamble of a great number of investment treaties. Based on an evolutionary interpretation of these terms, this section argues that the long-term ‘purpose’ of investment treaties is sustainable development.

## **2.1 Economic prosperity as the original, long-term purpose of investment treaties**

Much like the 1959 Germany-Pakistan treaty, the great majority of investment treaties signed in the 1960s, 70s and 80s, by countries such as Germany, Switzerland, Belgium & Luxembourg, the United Kingdom, Italy and the Netherlands often referred to the ‘prosperity’ of both contracting parties as the treaty’s ultimate goal.<sup>35</sup> Despite the vagueness of the term, in the post-war years ‘prosperity’ meant principally ‘economic growth’. These were the years of growth maximization and trickle-down policies pursued by governments and international assistance organizations alike based on classical economic development theory.<sup>36</sup> Raising the level of industrial output could increase GNP most rapidly; and as industrial output grew, it would generate more employment and higher incomes, which in turn would raise the level of demand for both agricultural and industrial goods, increase savings, allow for expanded capital formation and generate new investment spreading growth throughout the economic system.<sup>37</sup>

Development scholars at the time emphasized that economic growth was the principal tool for

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<sup>35</sup> See for example, 1961 Switzerland-Tunisia BIT (“*Reconnaissant qu’une protection contractuelle de ces investissements est susceptible de stimuler l’initiative économique privée et d’augmenter la prospérité des deux nations*”); 1965 Belgium/Luxembourg-Morocco BIT (“Recognizing that the contractual protection of investments is likely to stimulate private economic initiative and increase prosperity”); 1975 United Kingdom-Egypt BIT (“Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of business initiative and will increase prosperity in both States”); 1985 Italy-Tunisia BIT (“*Désireuses de renforcer leurs relations économiques et d’intensifier la coopération entre les deux pays en vue de favoriser leur développement; Convaincues qu’une protection des investissements en vertu d’un accord bilatéral est susceptible de stimuler l’initiative économique privée et d’accroître la prospérité des deux pays*”); 1979 Netherlands-Senegal BIT (“*Reconnaissant que l’encouragement de ces investissements est susceptible de stimuler l’initiative économique et d’augmenter la prospérité des deux nations*”), although most of the Dutch BITs, in those early years, referred to ‘mutual benefits’ instead of ‘prosperity’ (see 1965 Netherlands-Cameroon BIT: “*animés du désir de raffermir leurs liens d’amitié traditionnels, de développer et d’intensifier leurs relations économiques sur la base de l’égalité et des avantages réciproques, sont convenus des dispositions suivantes*”).

<sup>36</sup> See W Rostow, *The Process of Economic Growth* (New York: Norton, 1952); Arthur Lewis, *The Theory of Economic Growth*, (London: Allen and Unwin, 1955); Simon Kuznets, *Modern Economic Growth* (New Haven: Yale University Press, 1966).

<sup>37</sup> Kenneth Ruddle and Dennis A. Rondinelli *Transforming Natural Resources for Human Development: A Resource Systems Framework for Development Policy*, Resource systems theory and methodology series, no. 1 (The United Nations University, 1983) Ch 4.

reducing poverty in developing countries and that social services investments would be counterproductive.<sup>38</sup> National policy-makers believed that environmental protection and natural resource conservation programmes, for example, would inhibit rapid economic growth.<sup>39</sup>

Unsurprisingly then, other investment treaties, particularly those concluded by France, the United States and Japan, contain express references to ‘economic development’ or ‘economic prosperity’ in the preamble of their investment treaties.<sup>40</sup> Reference to ‘economic development’ can also be found in the preambles of the two draft conventions on foreign investment that were very influential in the initial formation and steady growth of bilateral investment treaties. Both the 1959 Abs-Shawcross Draft Convention on Investments Abroad and the 1962 OECD Draft Convention on the Protection of Foreign Property recognized the “importance of promoting the flow of capital for economic activity and development”.<sup>41</sup> In 2000, Professor Vandevelde interestingly noted that “BITs typically assert in their preambles that their purpose is to facilitate international investment flows and thereby promote economic prosperity” referring, as an example, to the 1993 UK-Armenia BIT, which actually, only referred to (an unqualified) ‘prosperity’.<sup>42</sup>

## **2.2 Sustainable development as investment treaties’ long-term purpose for the XXI century?**

Despite the original focus of investment treaties on ‘economic’ prosperity, there are several reasons supporting the argument that the underlying, long-term purpose of investment policies today is best captured by the more complex concept of sustainable development understood, for the time being, as involving the simultaneous pursuit of economic prosperity, environmental quality and social

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<sup>38</sup> “Such measures would be temporary palliatives, at the expense of savings and productive investment; direct and immediate attacks on mass poverty would only squander limited national resources.” Kapur, Lewis, and Webb, *The World Bank: Its First Half Century* 115.

<sup>39</sup> Ruddle and Rondinelli, *ibid*, citing United Nations, *Report of the United Nations Conference on the Human Environment Stockholm 1972* (Doc. A/CONF. 48/14).

<sup>40</sup> 1976 France-Malta BIT (“Recognising that encouragement and contractual protection of such investments are apt to stimulate the transfer of capital and technology between both nations in the interest of their economic development”); 1977 Japan-Egypt BIT (“Recognizing that the encouragement and reciprocal protection of investment will stimulate the flow of capital and technology for the benefit of the economies of the two countries”); 1983 United States of America-Senegal BIT (“Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of both Parties”).

<sup>41</sup> Equally, the great majority of all investment treaties emphasize in their preamble the contracting parties’ desire to intensify economic co-operation between them.

<sup>42</sup> Kenneth Vandevelde “The Economics of Bilateral Investment Treaties” 41 *Harvard International Law Journal* 469 (2, 2000) at 471. Cf UNCTAD, *Bilateral Investment Treaties in the Mid-1990s* (Geneva, 1998) at 29-31.

equity.<sup>43</sup>

First, one of the (macro-) economic assumptions underlying investment treaties, that increasing foreign investment will result in economic growth, has been proven at best an over-optimistic assumption. Studies looking at the link between foreign investment and economic development have found that the nature of the relationship between foreign investment and economic growth depends on a variety of situation-specific factors that vary from one country to the next.<sup>44</sup> Equally, the empirical evidence of the impact of investment treaties on attracting foreign investment is mixed at best.<sup>45</sup>

Second, while economic growth and stability do still matter, development theory and practice has shown that development is multifaceted and includes policies aimed at poverty reduction, protection of the environment, strengthening institutions and improving the human condition.<sup>46</sup> As noted in a World Bank publication “it is important to remember that development is far more complex than simply economic growth [...]. Development is also the qualitative transformation of a whole society, a shift to new ways of thinking, and, correspondingly, to new relations and new methods of production. Moreover, [...] transformation qualifies as development only if it benefits most people—improves their quality of life and gives them more control over their destinies.”<sup>47</sup> Accordingly, since development should be seen as a broader process involving economic, social, political and legal considerations, economic growth without social equity or economic redistribution without effective political participation could hardly be regarded as making a

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<sup>43</sup> World Business Council on Sustainable Development (WBCSD), <http://www.wbcsd.org/>. The link between international investment law and sustainable development has been the subject of several recent scholarly works including: Andrew Newcombe “Sustainable Development and Investment Treaty Law” 8 *Journal of World Investment & Trade* (2007); Marie-Claire Cordonier Segger, Markus W. Gehring, Andrew Newcombe (eds) *Sustainable Development in World Investment Law* (Kluwer, 2011); Hoi Kong and Kinvin Wroth (eds) *NAFTA and Sustainable Development: The History, Experience, and Prospects for Reforms* (Cambridge, CUP 2015).

<sup>44</sup> J Anthony VanDuzer, Penelope Simons and Graham Mayeda *Integrating Sustainable Development into International Investment Agreements* (London, Commonwealth Secretariat, 2013) at 21, citing K Gallagher and L Zarsky “No Miracle Drug: Foreign Direct Investment and Sustainable Development” in L Zarsky (ed.) *International Investment for Sustainable Development: Balancing Rights and Rewards* (London: Earthscan, 2005).

<sup>45</sup> See the various studies in Karl P. Sauvant and Lisa E. Sachs (eds.) *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (New York, OUP, 2009).

<sup>46</sup> Jennifer Ruger “The Changing Role of the World Bank in Global Health” 95.1 *American Journal of Public Health* (January 2005) at 69

<sup>47</sup> Tatyana P. Soubbotina *Beyond Economic Growth: An Introduction to Sustainable Development* (Washington DC: The World Bank, 2004, second edition) at 123.

meaningful contribution to development.<sup>48</sup>

Third, sustainable development is a widely accepted policy objective of the global community.<sup>49</sup> From the 1972 Stockholm Declaration, to the 1987 report of World Commission on Environment and Development (the Brundtland Report), the 1992 Rio Declaration, and the 2002 Johannesburg Declaration, the global community has affirmed time after time its commitment to sustainable development. Many international organizations including the United Nations (particularly with the establishment of the Commission on Sustainable Development), the World Bank, the World Trade Organization (WTO), the OECD, the European Union and the African Union, have endorsed the concept of sustainable development.<sup>50</sup> In his famous separate opinion in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Vice-President Weeramantry concluded that the principle of sustainable development is a part of modern international law in part because “of its wide and general acceptance by the global community”.<sup>51</sup>

It is thus not surprising that the concept of sustainable development has more recently become relevant in the context of international investment law and policy. In a recent survey exploring how investment treaties include language aimed at integrating the goals of investment protection and the promotion of sustainable development (including responsible business conduct), the OECD has found that, more than 75% of treaties signed between 2008 and 2013 refer to at least one of four concerns: environment, labour, anti-corruption and human rights.<sup>52</sup> Environmental concerns were the first issue to be mentioned in a treaty, appearing in the 1985 China-Singapore BIT, followed by labour issues appearing in the preamble of the 1990 Poland-United States BIT. Anti-corruption appeared in the 2000 Austria-Uzbekistan BIT and human rights concerns were first mentioned in the 2002 Austria-Malta BIT.<sup>53</sup> References occur most frequently in the investment treaty’s

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<sup>48</sup> See, generally, Amartya Sen, *Development as Freedom* (Oxford University Press 2000); Julio Faundez, ‘Rule of Law or Washington Consensus: The Evolution of the World Bank’s Approach to Legal and Judicial Reform’ in Amanda Perry-Kesaris (ed), *Law in the Pursuit of Development* (Routledge 2010) 180–201.

<sup>49</sup> Newcombe and Gehring

<sup>50</sup> Christina Voigt *Sustainable Development as a Principle of International Law* (Nijhoff, 2009) at 18-19.

<sup>51</sup> See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Separate Opinion of Vice-President Weeramantry, I.C.J. Reports 1997, p. 95.

<sup>52</sup> Kathryn Gordon, Joachim Pohl, Marie Bouchard *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey*, OECD Working Papers on International Investment (2014/01) at 9-10.

<sup>53</sup> Kathryn Gordon, Joachim Pohl, Marie Bouchard at 11.

preamble.<sup>54</sup> The preamble of the 2012 Canada-China BIT provides an interesting example as it refers expressly (and exclusively) to ‘sustainable development’, as follows:

THE GOVERNMENT OF CANADA AND THE GOVERNMENT OF THE PEOPLE’S  
REPUBLIC OF CHINA (the “Contracting Parties”),  
RECOGNIZING the need to promote investment based on the principles of sustainable  
development;  
DESIRING to intensify the economic cooperation of both States, based on equality and  
mutual benefit;  
HAVE AGREED as follows.<sup>55</sup>

In 2012, recognizing that a new generation of investment policies was emerging placing inclusive growth and sustainable development at the heart of efforts to attract, and benefit from, investment, UNCTAD formulated a comprehensive Investment Policy Framework for Sustainable Development (IPFSD) to serve as a point of reference for policymakers in formulating national investment policies and in negotiating or reviewing international investment treaties.<sup>56</sup>

### **2.3 Investment treaties, sustainable development and evolutionary interpretation**

While the majority of recently signed investment treaties seem to make express reference in the preamble or in the substantive provisions to sustainable development or to environmental, labour

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<sup>54</sup> Kathryn Gordon, Joachim Pohl, Marie Bouchard at 15. These preambles make it clear that investment promotion and protection need to respect other key public policy objectives including the protection of health, safety, the environment and consumers, or the promotion of internationally recognized labour rights. See UNCTAD *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking* (Geneva: UNCTAD, 2007) at 4.

<sup>55</sup> See the 2012 Canada-China BIT. Also, the preamble of the 2014 draft Canada-European Union Comprehensive Economic and Trade Agreement (“CETA”) notes in part as follows: “REAFFIRMING their commitment to promote sustainable development and the development of international trade in such a way as to contribute to sustainable development in its economic, social and environmental dimensions; DETERMINED to implement this Agreement in a manner consistent with the enhancement of the levels of labour and environmental protection and the enforcement of their labour and environmental laws and policies, building on their international commitments on labour and environment matters; [...] RECOGNIZING the importance of international security, democracy, human rights and the rule of law for the development of international trade and economic cooperation”. See also EU-Cariforum.

<sup>56</sup> UNCTAD, *2012 World Investment Report: Towards a New Generation of Investment Policies* (Geneva: United Nations, 2012) at 97 et seq. See also the practical handbook produced by the Commonwealth Secretariat to help enable developing countries to design international investment agreements that support their development needs. J Anthony VanDuzer et al *Integrating Sustainable Development into International Investment Agreements: A Guide for Developing Country Negotiators* (London: Commonwealth Secretariat, 2013).

or human rights,<sup>57</sup> the inclusion of such language is still relatively rare if one considers the overall stock of investment treaties. On the basis of a sample comprising 70% of all investment treaties, the OECD has recently estimated that only 12% of all investment treaties contain a sustainable development-related reference.<sup>58</sup> However, despite the lack of any express reference to sustainable development in most investment treaties, it is here argued that, based on an evolutionary interpretation of their preambles, the long-term purpose of most (3000 plus) investment treaties *is* in fact sustainable development.

There is general support for an evolutionary interpretation in case of general treaty terms or terms that are “by definition evolutionary”. The International Court of Justice (ICJ), in its *Namibia Opinion*, has given terms such as “the strenuous conditions of the modern world” or “the well-being and development of such peoples” an evolving meaning by referring to the evolution of the right of peoples to self-determination after the Second World War.<sup>59</sup> The Appellate Body of the World Trade Organisation (WTO) held that “the generic term ‘natural resources’ in Article XX(g) is not ‘static’ in its content or reference but is rather ‘by definition, evolutionary’.”<sup>60</sup> The basis for such decisions is the intention of the parties: “the idea is that the parties chose particular expressions with the knowledge and intention that these expressions would be capable of evolving over time.”<sup>61</sup> Since evolutionary intention is rarely expressed in the treaty, courts and tribunals have presumed such intention particularly from the ‘general’ character of the terms to be interpreted. In its judgement in *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, having found that the term ‘comercio’ was a generic term, the ICJ noted that the parties must necessarily have been aware that its meaning was likely to evolve over time, or in other words, “the

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<sup>57</sup> See Cordonier Segger & Newcombe “An Integrated Agenda for Sustainable Development in International Investment Law” in Cordonier Segger, Gehring, Newcombe (eds) *Sustainable Development in World Investment Law*, at 101 et seq.

<sup>58</sup> Kathryn Gordon, Joachim Pohl, Marie Bouchard at 12. “This attests to the strong ‘legacy’ effects in the treaty production process. In other words, older approaches to treaty practice live on in older treaties that have not been renegotiated, presumably due to the high cost of treaty renegotiation, and that are still in force due to the length of their validity periods.”

<sup>59</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, Advisory Opinion, ICJ Reports 1971, at pag 31, para. 53.

<sup>60</sup> *United States – Shrimp*, Appellate Body Report, WT/DS58/AB/R, 12 October 1998, para. 130.

<sup>61</sup> Julian Arato, “Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences” *The Law and Practice of International Courts and Tribunals* 9 (2010) 443 at 468; Eirik Bjorge *The Evolutionary Interpretation of Treaties* (Oxford, OUP: 2014) at 9.

parties must be presumed [...] to have intended those terms to have an evolving meaning.”<sup>62</sup> The Court strengthened the presumption by adding that “the treaty has been entered into for a very long period”.<sup>63</sup> When it comes to the evidence necessary to establish the substance of the term’s new meaning, the interpreter will be able to rely on changing legal or factual circumstances,<sup>64</sup> meaning developments in international law as well as in social or economic concepts.

While evolutionary interpretation has mostly been applied with regard to terms found in treaties’ substantive provisions, the same doctrine should be applicable when it comes to the interpretation of terms found in the treaty preamble in order to ascertain the treaty’s long-term purpose. Accordingly, an evolutionary interpretation appears possible when it comes to attribute meaning to generic terms such as ‘prosperity’, ‘development’, ‘benefits’, particularly when they are unqualified. I should, once again, emphasise that these are the terms that are crucial in order to identify the long-term purpose of an investment treaty. As noted above, in the preamble of their 1959 BIT, Germany and Pakistan recognized that their agreement “is likely to promote investment, encourage private industrial and financial enterprise and to increase the prosperity of both the States”.

Dictionary definitions of ‘prosperity’ are ambiguous. While they encompass in principle a wide set of circumstances (“a situation in which people enjoy wealth, success, or good fortune”; from Latin *pro spere*, “according to expectations”; from *pro*, “for” + *spes*, “hope”), they also appear to have an economic or financial slant, in particular (“an economic state of growth with rising profits and full employment”;<sup>65</sup> “the state of being prosperous” that is “successful or flourishing, especially financially”<sup>66</sup>). Something similar could be said for the term ‘development’: contrast, for example, “the process or fact of developing; the concrete result of this process” or “gradual advancement through progressive stages, growth from within”, on the one hand, with “the economic advancement of a region or people, esp. one currently under-developed”, on the other.<sup>67</sup>

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<sup>62</sup> *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, ICJ Reports 2009, p 243 at para. 66.

<sup>63</sup> *Ibid.*

<sup>64</sup> Julian Arato, at 467.

<sup>65</sup> World Net Dictionary

<sup>66</sup> Oxford Concise English Dictionary

<sup>67</sup> Oxford English Dictionary ([www.oed.com](http://www.oed.com))



It is here argued that, given their generic nature and the potentially long life of the underlying treaties, terms such as ‘prosperity’ and ‘development’ can today be interpreted on the basis of certain evolving factual circumstances. As noted in the previous section, economic and development theories have evolved away from economic growth-centred policies, and the last 30-40 years have witnessed the progressive rise of the concept of sustainable development as a central policy objective of the international community.

The argument based on evolutionary interpretation has, however, certain limits. How about those investment treaties, which refer expressly to ‘economic’ prosperity or ‘economic’ development? The answer here may depend on the strength of at least two sets of arguments. A first argument in favour of an evolutionary interpretation of terms such as ‘economic prosperity’ or ‘economic development’ may depend on the ‘age’ of the applicable investment treaty. Accordingly, an evolutionary interpretation in the direction suggested above would seem possible even with regard to an investment treaty that expressly refers in the preamble to ‘economic development’ as its long-term objective, at least where such treaty was signed before the mid-1990s. The rationale here is that only from the late 1990s it can be said that the concept of sustainable development has taken centre stage and thus an express reference to ‘economic’ prosperity or development as the long-term objective of an investment treaty cannot be read, on the basis of an evolutionary interpretation, to mean ‘sustainable’ development.

A second argument in favour of an evolutionary interpretation may be based on the evolving definition of ‘economic development’ in economics. In his textbook on *Economic Growth and Development*, Professor Van den Berg has suggested a definition of the term ‘economic development’ that is broader than the one provided by orthodox, or mainstream, economists. According to Van den Berg, “[e]conomic development describes the full range of changes in humanity’s economic, social, and natural environments that are perceived by people as making life more pleasant and satisfying.”<sup>68</sup>

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<sup>68</sup> Hendrik Van den Berg *Economic Growth and Development* (Singapore: World Scientific Publishing Co., 2014, 2<sup>nd</sup> Ed) at 28. “The complexity of the process of economic development and its interactions with our greater social and natural environments requires us to move beyond the familiar economic relationships studied by orthodox, or mainstream, economics. Gaining an understanding of our complex human existence is a difficult task. To be

### 3. Sustainable development and the principle of integration

While sustainable development is an evolving and multi-faceted concept,<sup>69</sup> one can identify at least three, interrelated key elements of such concept: inter-generational equity (to preserve natural resources for the benefit of future generations), intra-generational equity (to ensure that all people within the current generation are able to meet their basic needs) and integrative decision-making (to integrate economic growth, environmental protection and social development at all levels of decision-making). In a recent World Bank Institute publication, Soubotina captures these three key elements as follows:

‘Sustainable’ development could probably be otherwise called ‘equitable and balanced’, meaning that, in order for development to continue indefinitely, it should balance the interests of different groups of people, within the same generation and among generations, and do so simultaneously in three major interrelated areas—economic, social, and environmental. So sustainable development is about equity, defined as equality of opportunities for well-being, as well as about comprehensiveness of objectives.<sup>70</sup>

These three elements also explain the popularity of sustainable development as a shared aspiration of the global community. In principle, a broad understanding of equity spanning over time and space as well as the realization of the complexity and interconnectedness of our economic, environmental and social challenges cannot but be seen as the enlightened vision for the XXI century. Equally, however, these three elements explain the global community’s frustration with its attempt to actually achieve sustainable development. In a way, the higher the vision, the greater the difficulty in achieving it.

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successful, we need to formally recognize the interdependence of social and natural phenomena. And, we need to adopt an efficient method for increasing our knowledge about this complex reality. The perspective we take in this textbook is called holism, our approach to economic modeling is heterodox, and our method of analysis seeks to follow the steps of the scientific method.” Ibid at 29.

<sup>69</sup> Nico J. Schrijver *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (The Hague Academy of International Law) at 366-74.

<sup>70</sup> Tatyana P. Soubotina *Beyond Economic Growth: An Introduction to Sustainable Development* (Washington DC: The World Bank, 2004, second edition) at 9.

Despite its evolving and multifaceted nature, I share the view according to which integrative (or integrated) decision-making (or the principle of integration) is the ‘most important’ element of sustainable development.<sup>71</sup>

Tladi highlights two dimensions of integration. At one level, he notes that under the classic definition of sustainable development given in the Brundtland Commission report <sup>72</sup> “intergenerational equity concerns have to be balanced against immediate, intragenerational equity concerns.”<sup>73</sup> At another level, Tladi emphasizes that “[a]t the heart of the Brundtland Commission report lies a call for integration. The Report describes the various economic, social and environmental problems as ‘interlocking crises’ requiring an integrated solution.”<sup>74</sup> The two dimensions are obviously interwoven as meeting the needs of the future depends crucially on how well we balance economic, environmental and social objectives or needs when making decisions today.<sup>75</sup> The list of relevant needs is open-ended and subject to evolution. The World Bank Institute has highlighted the following: under economic needs it includes generally ‘services’, ‘household needs’, ‘industrial growth’, ‘agricultural growth’, and ‘efficient use of labour’; under environmental needs, it includes ‘biodiversity’, ‘rational use and conservation of natural resources’, ‘carrying capacity’, ‘ecosystem integrity’, and ‘clean air and water’; and under social needs, it lists ‘equity’, ‘participation’, ‘empowerment’, ‘social mobility’ and ‘cultural preservation’.<sup>76</sup>

Accordingly, in the context of achieving sustainable development, integration will require two kinds of decision-making exercises. First, since the various economic, environmental and social

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<sup>71</sup> Philippe Sands *Principles of International Economic Law* (Cambridge, CUP 2003) at 263. On the principle of integration as a ‘fundamental component of sustainable development’, see further International Law Association (ILA) *Report of the ILA Committee on International Law and Sustainable Development* (Toronto, 2006) at 468-522.

<sup>72</sup> “Sustainable development is development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.”

<sup>73</sup> Dire Tladi *Sustainable Development In International Law: An Analysis Of Key Enviro-economic Instruments* (Pretoria: Pretoria University Law Press, 2007) at 74.

<sup>74</sup> Dire Tladi *Sustainable Development In International Law*, at 75.

<sup>75</sup> See the definition of sustainable development provided by the Development Education Program (DEP) of the World Bank Institute (WBI) (<http://www.worldbank.org/depweb/english/sd.html>). The WBI is the learning arm of the World Bank.

<sup>76</sup> See the definition of sustainable development provided by the Development Education Program (DEP) of the World Bank Institute (WBI) (<http://www.worldbank.org/depweb/english/sd.html>). The WBI is the learning arm of the World Bank.

needs may be mutually supportive (for example, economic growth may lead to greater equity through the ability of governments to fund stronger welfare systems; or economic growth may lead to rational use of natural resources through the ability to afford more efficient technology), integrative decision-making will demand establishing those positive links across the various needs. Second, since these various objectives may indeed be in conflict with one another (for example, economic growth may lead to inequity or environmental degradation), integrative decision-making will require a complex and delicate balancing exercise. The 2002 *Johannesburg Declaration on Sustainable Development* noted States’ “collective responsibility to advance and strengthen the *interdependent* and *mutually reinforcing* pillars of sustainable development—economic development, social development and environmental protection—at the local, national, regional and global levels”.<sup>77</sup>

In the policy discussions, at least at the international level, one often hears the rhetoric of ‘mutual supportiveness’, only. For example, in the preamble of the *Doha Declaration*, WTO Members have highlighted their conviction that “the aims of upholding and safeguarding an open and non-discriminatory multilateral trading system, and acting for the protection of the environment and the promotion of sustainable development, can and must be mutually supportive”.<sup>78</sup>

However, a large part of the attractiveness of the concept of sustainable development rests on an understanding of integration as balancing different, and often conflicting needs, without any hierarchy between the three pillars (economic growth, environmental protection and social development). The crucial aspect here is that the balancing between the various needs or objectives has no *a priori* correct outcome that is inherent in the very concept of sustainable development. The actual outcome of a given balancing exercise will crucially depend on the relevance given, by the decision-maker, to the various economic, environmental and social needs at issue in the specific case. In this sense, the principle of integration focuses on establishing an appropriate *process* capable of achieving sustainable development rather than providing the result of that balance.<sup>79</sup> In

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<sup>77</sup> *Johannesburg Declaration on Sustainable Development*, in Report of the World Summit on Sustainable Development, A/CONF. 199/20 (New York: United Nations, 2002) paragraph 5 (emphasis added).

<sup>78</sup> See Emily Lydgate “Sustainable Development in the WTO: from Mutual Supportiveness to Balancing” 11 *World Trade Review* 4 (2012) at 628-632.

<sup>79</sup> Alan Boyle and David Freestone *International Law and Sustainable Development* (OUP, 1999) at 17-18. On the role of sustainable development as an interstitial norm, see Vaughan Lowe “Sustainable Development and

other words, the pursuit of sustainable development according to the integration principle will entail the need to take all three dimensions into account in development decision-making.<sup>80</sup> This process-based approach will include the creation of ‘interlocking mechanisms’, such as environmental or social units in development-related departments at the national and international levels, the use of sustainability or ‘integrated’ impact assessments, as well as information exchanges and cooperative strategies at and across all levels of government, whether national or international.<sup>81</sup> Practices, standards and rules will of course develop over time with regard to addressing and resolving specific issues and specific balancing conundrums. However, the point I want to stress here is that, at a primordial level, the concept of sustainable development leaves a lot of freedom to the decision-maker in the determination of the appropriate balance between economic growth, environmental protection and social development.

For example, a decision to privatize the provision of waste services by a local municipality may provide the opportunity to appreciate integrative decision-making for purposes of pursuing sustainable development. Privatization will potentially allow foreign investors to bid for the relative waste service licenses or concessions. That in turn may lead to an injection of hard capital and new technology that may be mutually beneficial in terms of economic growth (more jobs, higher corporate tax), environmental protection (less pollution) and social development (better paid jobs). These positive spill-overs may depend on many factors including the content of regulation underlying the specific license or concession, as well as any other general legislation addressing performance requirements applicable to foreign investors, environmental laws as well as corporate practice including social responsibility ones.

However, there will also be balancing decisions to be made. For example, the local municipality will need to identify a waste disposal site within its territory. That decision may have a negative impact on the local environment (at least with regard to the specific area where the site is located)

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Unsustainable Arguments” in A Boyle & D Freestone *International Law and Sustainable Development: Past Achievements and Future Challenges* (Oxford, OUP: 1999).

<sup>80</sup> Marie-Claire Cordonier Segger and Ashfaq Khalfan *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford: OUP 2004) at 104. Lawyers have referred to this dichotomy by contrasting ‘obligations of means’ with ‘obligations of result’.

<sup>81</sup> Marie-Claire Cordonier Segger and Ashfaq Khalfan *Sustainable Development Law: Principles, Practices, and Prospects* (Oxford: OUP 2004) at 104-108.

as well as on the profitability of the business (for example, if the site is located in a remote area) and the social development of the municipality (for example, if the site is located in an already deprived area within the municipality). Alternatively, the municipality may decide to transfer and dispose of the waste outside its territory maximising the benefits to its environment, which will however put a greater burden on its finances. Similarly, the municipality may also decide to grant a tax incentive in order to attract a waste disposal provider that can guarantee a more environmentally-friendly technology or in order to require the waste disposal provider to expand and improve waste collection to more deprived parts of the municipality. All of these decisions will entail balancing costs and benefits across the three pillars of sustainable development. Crucially, having fully considered the facts at issues and the various relevant implications, it will be for the municipality to strike the appropriate balance between economic growth, environmental protection and social development on the basis of its policy priorities and choices as the concept of sustainable development is not by itself capable of providing for such balancing.

Accordingly, the principle of integration, as the key component of sustainable development, emphasises the need to take into account economic growth, environmental protection and social development. In certain circumstances, this will lead to a maximisation of all three policy values (a triple win situation). In other cases, this will require a balancing exercise, which will entail the determination of winners and losers. Crucially, the determination of the appropriate balance between economic growth, environmental protection and social development is not found in the concept of sustainable development but is left to the relevant decision maker.

#### **4. Integrative decision-making and reasonableness standards: What kind of review for investment tribunals?**

As noted in the introduction, investment treaty tribunals are called to review the conduct of host States on the basis of a variety of norms principally found in investment treaties. Some of these norms include substantive reasonableness requirements embodied for example in the fair and equitable treatment standard and the prohibition of uncompensated indirect expropriation.

Reasonableness, particularly in its substantive connotation, is a notoriously ubiquitous and imprecise concept. It is employed in a variety of different contexts, for example, as a ground of judicial review of administrative conduct<sup>82</sup> or as a parameter for the constitutionality review of laws.<sup>83</sup> More fundamentally, reasonableness includes a variety of different normative standards or tests: from the more generic (or tautological) ones like the famous *Wednesbury* formulation in English law -- “so unreasonable that no reasonable authority could ever come to it”,<sup>84</sup> to the more structured ones such as the three-pronged proportionality test (suitability, necessity and proportionality *stricto sensu*) in German and EU law.<sup>85</sup>

As noted above, despite the different origin and terminology, the overlap between reasonableness and proportionality is extensive.<sup>86</sup> Both concepts entail first of all, a review of whether the public decision is effective in, or materially contributes to, achieving its purported objective (or the ‘means’ employed by the public authority are rationally related to the ‘ends’ pursued).<sup>87</sup> Second, they include an inquiry on whether the public decision under review is necessary to achieve its purported aim (or no other less costly means capable of pursuing that same aim exists). Finally, both reasonableness and proportionality may entail a review of whether the public decision has an excessive impact on the applicant’s interests compared to the benefits to the chosen public policy.

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<sup>82</sup> T.R. Hickman “The reasonableness principle: Reassessing its place in the public sphere” *Cambridge Law Journal* (2004) 166.

<sup>83</sup> Andrea Morrone “Constitutional Adjudication and the Principle of Reasonableness” in G Bongiovanni, G Sartor, C Valentini (eds) *Reasonableness and the Law* (Springer, 2009). In the context of private international law, see Andreas Lowenfeld *International Litigation and the Quest for Reasonableness* (Oxford, OUP: 1996).

<sup>84</sup> Wolff, Jowell, Le Sueur, Donnelly, Hare *De Smith’s Judicial Review* (London, Sweet & Maxwell, 2013 7<sup>th</sup> Ed) at 594. However, it has been recognized that behind the vague *Wednesbury* formulation one can find several distinct tenets and principles falling under the following categories: (a) unreasonable process including decisions based on considerations which have been accorded manifestly inappropriate weight; decisions which are apparently illogical or arbitrary; uncertain decisions; decisions supported by inadequate or incomprehensible reasons; decisions supported by inadequate evidence or which are made on the basis of a material mistake or disregard of fact, (b) violation of constitutional principles including the rule of law and formal and substantive equality, and (c) oppressive decisions including those decisions that are unnecessarily or excessively onerous. Wolff, Jowell, et al. at 594 et seq.

<sup>85</sup> Jurgen Schwarze *European Administrative Law* (London, Sweet & Maxwell, 2006).

<sup>86</sup> For example, on the overlap between reasonableness and proportionality in English law, see Wolff, Jowell, et al. at 633-634. Within the broader European context, see E Ellis (ed.) *The Principle of Proportionality in the Laws of Europe* (Oxford, OUP 1999); N Emiliou, *The Principle of Proportionality in European Law: A Comparative Study* (London, Kluwer, 1996).

<sup>87</sup> See, for example, the ‘rational relation test’ under United States constitutional law or the ‘means/end test’ applied by WTO dispute settlement bodies under Article XX GATT.

The appeal (and success) of the proportionality principle, as a global judicial review mechanism,<sup>88</sup> lies in part on the clarity with which its various (reasonableness) components are laid out.<sup>89</sup> Scholars have repeatedly noted that the three prongs of proportionality (suitability, necessity and proportionality *stricto sensu*) constitute an ascending series in terms of the intrusiveness of the review of public decisions.<sup>90</sup> Crucially, unless the law-maker expressly provides which of the various components (eg. suitability, necessity, proportionality *stricto sensu*) are applicable, the choice of which test to apply is left to the adjudicator.

The central point for purposes of this paper is that the difference in the level of intrusiveness is linked to the different nature of the various tests or tenets falling under reasonableness or proportionality. Particularly, ‘suitability’ and ‘necessity’ differ from ‘proportionality *stricto sensu*’ since the former take as given the policy objective(s) pursued by the public authority (say environmental protection) including the specific level(s) of protection chosen by that public authority (say zero pollution). Going back to our waste disposal scenario, a review based on suitability and necessity would involve the following inquiries: first, does the decision to (re)locate the waste disposal facility outside the territory of the municipality contribute to achieve the zero environmental pollution aim chosen by the municipality? Second, are there alternative options to the decision to (re)locate the facility outside the territory, which would be capable of achieving the same zero environmental pollution aim at a lesser cost? In principle, while implying two different level of intrusiveness in the decision-making of the municipality, the two tests never put into question the chosen level of environmental protection.

When it comes to proportionality in the strict sense, the adjudicator will zoom in on those very choices and balance the costs and benefits of the public decision: is the adverse economic impact (including on the foreign investment) of the decision to (re)locate disproportionate vis-à-vis the environmental benefits of a zero pollution policy? It is for this reason that courts and tribunals,

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<sup>88</sup> Alec Stone Sweet and Jud Mathews, "Proportionality Balancing and Global Constitutionalism" *Columbia Journal of Transnational Law* 47 (2008) 73-165.

<sup>89</sup> Marta Cartabia, "I principi di ragionevolezza e proporzionalità nella giurisprudenza costituzionale italiana", *Conferenza trilaterale delle Corti costituzionali italiana, portoghese e spagnola, Roma, Palazzo della Consulta 24-26 ottobre 2013* (emphasizing how the Italian Constitutional Court employs the various proportionality prongs under its reasonableness review without, however, a clear orderly systematization).

<sup>90</sup> Jan Jans, "Proportionality Revisited" 27 *Legal Issues of Economic Integration* (2000) 239 at 241.



particularly at the international level, appear to exercise caution when it comes to this type of balancing. For example, the Appellate Body (AB) of the WTO has so far stayed away from a cost/benefit balancing expressly noting that WTO Members have the right to determine for themselves the desired level of protection.<sup>91</sup> The AB example is noteworthy as it shows how sometimes the term ‘balancing’ is used loosely in the context of a determination of suitability or necessity to emphasize that the court or tribunal needs to consider different aspects.<sup>92</sup> However, it is only within the third prong (of proportionality in the strict sense) that a court or tribunal is called upon to balance between different values or interests.

Accordingly, in light of the fact that sustainable development is the underlying long-term purpose of the investment treaty (as argued above), an investment tribunal should interpret, say, the FET standard or the provision on expropriation or the prohibition of arbitrary, unjustifiable or unreasonable measures to exclude a review that entails a balancing between the various values or interests at issue. As noted above, the crucial aspect of the concept of sustainable development understood as the integration of economic growth, environmental protection and social development, is that the balancing between the various needs or objectives has no *a priori* correct outcome that is inherent in the concept of sustainable development. The actual outcome of a given balancing exercise will crucially depend on the relevance given, by the decision-maker, to the various economic, environmental and social needs at issue in the specific case. Accordingly, in the context of a (substantive) reasonableness review carried out by an arbitral tribunal under an investment treaty, where the treaty itself does not specify the type of review,<sup>93</sup> cost-benefit balancing should be excluded.

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<sup>91</sup> Appellate Body Report on *Korea—Beef*, WT/DS161/AB/R and WT/DS169/AB/R, circulated 11 December 2000, adopted 10 January 2001, para. 176. For a more skeptical assessment see Filippo Fontanelli “Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about ‘Weighing and Balancing’” 5 *European Journal of Legal Studies* (Autumn/Winter 2012/13), p 36-56.

<sup>92</sup> See Don Regan, “The Meaning of ‘Necessary’ in GATT Article XX and GATS Article XIV: The Myth of Cost-Benefit Balancing” 6 *World Trade Rev.* 347 (3, 2007).

<sup>93</sup> For an (interesting) example of such express specification, see the Annex B on Expropriation of the 2012 United States model BIT: “The determination of whether an action [...], in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors: (i) the economic impact of the government action [...]; (ii) extent of interference with distinct, reasonable investment-backed expectations; and (iii) the character of the government action.”

In other words, the recognition that the (narrow) ‘object’ of an investment treaty is an instrument to achieve the (broader) ‘purpose’ of sustainable development has two implications. First, the investment treaty recognises the existence of values (economic growth, environmental protection, social development) that are greater than affording protection to foreign investors. Second, the reasonableness-type standards imposed on host States for the protection of foreign investment do not impose any restraints on States’ balancing among those values. Accordingly, an interpretation of investment treaty provisions requiring reasonableness in light of the object and purpose of the investment treaty will exclude a review based on the measure’s proportionality in the strict sense.

Two additional clarifications should be made here. First, our argument against strict balancing does not per se undermine investment protection (as the relevant ‘object’ of investment treaties). An interpretation of reasonableness-type standards in light of sustainable development does not prevent an investment tribunal’s application of ‘suitability’ and ‘necessity’. As noted above, rather than simply procedural, the nature of the review based on these tests is substantive, including, for example, whether there are sufficient grounds for the public action under review or whether the action taken is the most effective or efficient measure available. Accordingly, a review based on ‘suitability’ and ‘necessity’ will involve a meaningful, substantive review of host State conduct, albeit a more limited type of review, one that does not include reviewing the attribution of values or the setting of policy priorities by the host State.

Second, it should also be emphasized that investment tribunals operating such limited type of review (based on suitability and necessity) will still be facing some difficult and sensitive decisions such as determining (a) the extent of the means-end relationship between the host State measure and the public policy objective being pursued with that measure, (b) the level of protection aimed at by the host State, (c) the existence of less restrictive alternatives that are reasonably available to the host State, and (d) the standard of review (ie., the intensity of the review) carried out under suitability and necessity. The experience of international adjudicative bodies, in particular those in similarly monothematic institutions (such as the WTO), will certainly offer very useful insights on these various challenges.<sup>94</sup>

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<sup>94</sup> See recently, Caroline Henckels *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge, CUP 2016) chapter 3.

## 5. Concluding Remarks

The number of critics of the investment treaty system has grown in the past few years. Many of the criticism are legitimate and need to be addressed. This paper attempts to deal with one critical question: how far should investment tribunal go in reviewing host State conduct on the basis of investment treaties? The paper's answer is that, when reviewing host State conduct on the basis of reasonableness-type standards, investment tribunals should avoid a review based on strict balancing or proportionality in the strict sense (also known as cost-benefit balancing).

The argument advanced in the paper is, first of all, addressed to, and can be taken up by, the treaty interpreter. Called upon to exercise their adjudicative functions, investment treaty tribunals need to appreciate the complex nature of the treaty's 'object and purpose'. While investment treaties focus on investment protection, they are fundamentally aimed at achieving broader objectives, such as prosperity, development and in particular today, sustainable development. In light of the complexity of investment treaties' object and purpose, investment protection standards that focus on the reasonableness of the host State conduct should be read to exclude any strict balancing or proportionality requirements. Given the fact that investment treaty protection are ultimately aimed at enabling States' pursuit of a variety of (at times conflicting) policy interests, investment tribunals should leave the balancing of such interests to the States. While this is no revolutionary suggestion, it is important to clearly lay the outer boundaries of the function of an international investment tribunal.<sup>95</sup>

The case against strict balancing is also very much relevant for the policy (or treaty) maker. There is a very lively debate among policy makers about the scope and content of future international investment disciplines. Policy makers are well aware of the key challenges that they are facing.<sup>96</sup> International investment policies (including treaties) are not simply about encouraging foreign investment but they are about ensuring economic growth, environmental protection and social

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<sup>95</sup> See further Lukasz Gruszczynski and Wouter Werner (eds) *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (Oxford, OUP, 2014).

<sup>96</sup> See Karl Sauvant and Federico Ortino *Improving the International Investment Law and Policy Regime: Options for the Future* (Helsinki: Ministry for Foreign Affairs of Finland, 2013).

equity. Investment treaties should not simply afford a “strong protection to investors and investments” but they should also preserve “the authority to adopt and maintain measures necessary to regulate in the public interest to pursue certain public policies.”<sup>97</sup> Accordingly, future international investment disciplines should expressly clarify that investment protection standards do not involve any strict balancing. Current proposals on the negotiating table for a Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States show mixed signals: the general provision guaranteeing the right of the Parties to regulate through measures necessary to achieve legitimate policy objectives<sup>98</sup> is accompanied by a definition of ‘indirect expropriation’ that entails forms of strict balancing.<sup>99</sup>

In addition, in order to bring about greater clarity, excluding strict balancing from the realm of international investment disciplines would fundamentally strengthen the legitimacy of the entire investment system. As long as the system remains limited in its subject-matter (such as the name of the TTIP clearly indicates), any attempt to include disciplines that encompass balancing between investors’ interests and broader public policy values will lead to controversy, resistance and ultimately failure. This is not so much because of the alleged inability of international tribunals to perform such balancing exercise when an actual dispute arises. It is the very monothematic nature of the investment treaty system (as it principally focuses on affording protection to foreign investments) that does not allow for an accurate and thus legitimate balancing of a variety of different interests, policies and values to take place. This is one of the consequences of the multiplication (and success) of specialised regimes and thus fragmentation of international law. Obviously strict balancing by an international court or tribunal is in principle technically and politically possible but only in broader and more integrated systems (such as within the European Convention of Human Rights or the European Union). Short of that, excluding any such balancing represents one of the techniques for the ‘peaceful’ cohabitation of specialised regimes in international law.

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<sup>97</sup> The 2012 Statement on Shared Principles for International Investment by the European Union (EU) and the United States.

<sup>98</sup> See Article 2(1) of the Chapter on Investment in the EU draft proposal of September 2015.

<sup>99</sup> See Annex on Expropriation in the EU draft proposal of November 2015. For a critical comment on the latter see Federico Ortino “Defining Indirect Expropriation: The TTIP Approach and the (Elusive) Search for ‘Greater Certainty’” 43 *Legal Issues of Economic Integration* (forthcoming 2016).